

March 18, 2021

Susan A. Betts
Deputy Assistant Secretary for Finance and Budget
Department of Housing and Urban Development
451 7th St S.W.
Washington, D.C. 20410

RE: Mortgagee Letter 2021-05

Dear Ms. Betts:

We write in response to Mortgagee Letter 2021-05, which expanded the relief available to borrowers with COVID-19 hardships. We applaud HUD and the Biden Administration for extending the foreclosure moratorium and the deadline for accessing forbearance to June 30, 2021. These actions will save homeowners from unnecessary foreclosure and protect neighborhoods from further financial damage.

We also strongly support amendments that HUD has made to the loss mitigation options available to borrowers facing COVID-19 hardships through Mortgagee Letter 2021-05. By eliminating the limit of one COVID-19 relief option per loan, HUD will ensure that borrowers facing an incomplete recovery from the pandemic or multiple pandemic-related hardships do not unnecessarily lose their homes to foreclosure. As the pandemic extends into its second year, low-income borrowers are very likely to have faced overlapping financial strains, and HUD's policy change supports these borrowers. We also strongly support HUD's decision to remove the requirement that borrowers must have been current as of March 1, 2020 in order to access COVID-19 relief. The pandemic compounded harm on borrowers who were already struggling, and HUD's amendment will help those borrowers quickly resolve their hardship when they recover. Finally, we appreciate HUD providing clarity that borrowers with COVID-19 hardships need not access a forbearance plan as a precondition to a COVID-19 final loss mitigation option. Unfortunately, some borrowers were unable to access forbearance, and they should not be penalized for not connecting with their servicers.

In order to further assist borrowers facing COVID-19 hardships, we believe HUD should:

1) Require servicers to communicate to borrowers exiting forbearance that multiple loss mitigation options are available, including loan modifications.

Given the widespread financial harm caused by the pandemic, many FHA-insured borrowers, especially in the communities of color hardest hit by COVID-19, will not fully recover their ability to pay their pre-hardship mortgage payments. Fortunately, HUD's current COVID-19 loan modification options will allow borrowers who need it to access significant payment relief.

Borrowers who need payment reduction, however, may not be aware that such relief is possible because of the current structure of HUD's COVID-19 waterfall. Under Mortgagee Letter 2021-05, the servicer begins its analysis of a borrower's situation by asking if the borrower can resume their pre-hardship mortgage payment. If the borrower says yes, the borrower is offered a standalone partial claim and the analysis ends. The current guidance does not require any further communication.

If borrowers are not made aware that there are other options beyond the standalone partial claim, there is a significant risk that, for fear of losing their homes, they will tell their servicers they can afford the current payments even if they cannot. Borrowers should not choose deferral out of fear or misinformation. To avoid this, **HUD should require servicers to inform borrowers at the outset of their post-**

forbearance discussions that options are available both to resume monthly payments or obtain a reduced payment.

HUD should also require servicers to mail out a written notice to borrowers nearing the end of the forbearance period that lists in clear terms the COVID-19 loss mitigation options available. The notice cannot substitute for requiring disclosure of options during a post-forbearance discussion because borrowers will often select their loss mitigation option over the phone. However, a written notice is another means of providing crucial information and may cause some borrowers to engage with their servicers. HUD should work with the Consumer Financial Protection Bureau (CFPB) to develop model notices to improve clarity.

In addition to requiring servicers to inform borrowers of the COVID-19 options over the phone and in writing, with so much riding on the phone conversation, **we urge HUD to develop a model servicer script to guide the conversation with borrowers nearing the end of forbearance.** We have heard reports from homeowners and their advocates that servicers are failing to clearly communicate all options to borrowers. We know from a recent HUD Office of Inspector General (OIG) report that servicers often do not clearly or accurately communicate available options to borrowers.¹ HUD's system, however, depends entirely on servicers talking to borrowers to determine which options should be made available. This initial process occurs without the exchange of financial documents, even though some documentation may be needed later depending on which options apply. HUD should develop material with an eye to borrower comprehension that will help borrowers select the appropriate option for them.

- 2) **Mandate that servicers simultaneously offer the COVID-19 Owner-Occupant Loan Modification and the COVID-19 Combination Partial Claim and Loan Modification pursuant to our Regulation X proposal.**

We support HUD offering streamlined modifications; however, servicers may run afoul of Regulation X provisions requiring simultaneous review of all loss mitigation when implementing HUD's system. We support the CFPB in amending Regulation X to more easily allow for COVID-19 streamlined modification offers, including review for all streamlined modifications simultaneously. It is only by requiring review of all streamlined modifications together that borrowers can have access to the option that best fits their situations.

We propose that if the servicer offers more than one COVID streamlined modification option, the borrower must be reviewed for all such options simultaneously. As it applies to FHA-insured borrowers, the servicer should simultaneously offer the COVID-19 Owner-Occupant Loan Modification and COVID-19 Combination Partial Claim and Loan Modification if the borrower does not choose a partial claim. Under our proposal, servicers may not offer only one COVID streamlined modification option to the exclusion of others that might be available from an investor if the only question relevant to eligibility for the other option(s) is whether the borrower states that they can afford the first modification option.

FHA's Mortgagee Letter 2021-05 seems to direct servicers to first offer only the Owner-Occupant Loan Modification, and not review the borrower for the Combination Partial claim and Loan Modification unless the borrower attests that they cannot afford the payment with the Owner-Occupant Loan Modification. This kind of sequential review is precisely what RESPA was designed to prevent to ensure that the borrower has access to all appropriate options. RESPA permits servicers to implement an investor "waterfall," but does not permit a servicer to stop evaluating for a particular option based solely upon a borrower's preference.² A borrower's uninformed preference may hinder access to the most appropriate option. An unsupported statement from the borrower regarding what they can afford is tantamount to stating a preference. As with the standalone partial claim, a borrower may simply state they can afford an option if they believe it is their only alternative to foreclosure. Optimism bias is a well-known

¹ HUD Office of Inspector General (OIG), Some Mortgage Loan Servicers' Websites Offer Information about CARES Act Loan Forbearance That Is Incomplete, Inconsistent, Dated, and Unclear (Apr. 27, 2020), <https://www.hudoig.gov/sites/default/files/2020-04/Single%20Family%20Mortgage%20Forbearance%20Brief.pdf>.

² See Section-by-Section Analysis, Amendments to the 2013 Mortgage Rules, 81 Fed. Reg. 72,160, 72,239-42 (Oct. 19, 2016).

phenomenon, and the borrower's response may be based on little more than a mixture of hope and desperation.

For the same reasons considered by the Bureau in 2016,³ including concerns about steering by servicers and imperfect information on the part of borrowers, **FHA should require servicers to simultaneously offer the borrower both of the COVID streamlined modification options, rather than offering only one option based merely on a statement about what the borrower can afford.**⁴

Before a binding acceptance of any particular option, FHA should require the servicer to give the borrower a written description of the terms for each option, including at least the following:

- Monthly payment (including principal, interest, and escrow, and stating whether there is an escrow shortage that will not be included in the principal balance and if so, indicating the number of monthly payments the borrower will be required to make to pay the escrow shortage;
- Effective date and date of first payment);
- Interest rate;
- Term (including if there is an option for a shorter repayment term);
- New interest-bearing principal balance; and
- The amount of any partial claim.

The servicer must also be required to give the borrower written notice of its evaluation of the borrower's application for COVID modification options, indicating that the borrower may choose one of the options the borrower has been found eligible for, and the notice shall comply with 12 C.F.R. § 1024.41(d) for the denial of any options.

Moreover, FHA should require that if a servicer evaluates the borrower for the COVID-19 FHA-HAMP requiring an analysis of financial information and finds that it does not provide more payment relief, the servicer must renew the offers of the COVID streamlined modification options. Borrowers should not lose an option they would otherwise be eligible for based on a desire to be evaluated for all available options. We are asking the CFPB to clarify that such a framework is required by RESPA, and FHA should adopt it for the same reasons. It is important to protect borrowers from the potential harms of sequential review for single options that the Bureau sought to prevent when it issued the loss mitigation rule. This includes the harm of having to apply separately for each possible loss mitigation option and being asked to make a decision regarding one option without complete information.

3) Implement specific guidelines for servicers to contact borrowers who are nearing the end of forbearance.

Unlike the Government Sponsored Enterprises (GSEs), HUD does not specify when servicers should contact borrowers who are approaching the end of their forbearance period. This lack of policy has consequences. As we have heard from advocates in the field, FHA-insured borrowers have been dropped from forbearance plans without any discussion of extension or post-forbearance options.

HUD should adopt policies to better promote borrower transition into either extended forbearance or loss mitigation options in line with the GSEs. For example, in Lender Letter 2021-02, Fannie Mae requires "For borrowers who have received a forbearance plan in response to COVID-19, the servicer must begin attempts to contact the borrower no later than 30 days prior to the expiration of the forbearance plan term, and must continue outreach attempts until either QRPC is achieved or the forbearance plan term has expired." **HUD should adopt a similar policy requiring outreach at least 30 days prior to the end of the forbearance.**

³ See Section-by-Section Analysis, Amendments to the 2013 Mortgage Rules, 81 Fed. Reg. 72,160, 72,239-42 (Oct. 19, 2016).

⁴ Section-by-Section Analysis, § 1024.41, 78 Fed. Reg. 10,696, 10,859 and 10,828 ("The Bureau simply does not believe that permitting servicers to steer borrowers to apply for particular loss mitigation options, when the servicer has a far superior capacity to make the relevant determination, reasonably protects the borrower's interest.") (Feb. 14, 2013).

4) Require waiver of late fees consistent with FHA-HAMP policy.

According to Mortgagee Letter 2021-05, in connection with implementing each COVID-19 loss mitigation option, “all Late Charges, fees, and penalties are waived except that Mortgagees are not required to waive Late Charges, fees, and penalties, if any, accumulated prior to March 1, 2020.” (emphasis added)

HUD should eliminate the exception to the late fee waiver policy and require waiver of all late fees.

We recognize HUD may have proposed non-waiver of pre-March 1, 2020 late fees in relation to its decision to expand COVID-19 options to borrowers in default prior to March 1, 2020. However, by allowing some late fees to be capitalized, HUD treats borrowers in default prior to March 1, 2020 with COVID-19 hardships worse than other borrowers with non-pandemic hardships. HUD’s standard loss mitigation policy is to waive late fees when borrowers complete loss mitigation options. Under FHA-HAMP, “The Mortgagee must waive Late Charges under the original Mortgage as long as the Borrower is on or paying its agreed Loss Mitigation Option.” HUD should continue its consistent policy and require waiver of late fees without exception.

Moreover, any servicer inclusion of late fees in the COVID-19 Standalone Partial Claim would violate the Consumer Financial Protection Bureau’s Interim Final Rule (IFR) on pandemic relief. Under the IFR, 12 C.F.R. § 1024.41(c)(2)(v)(A)(2), the servicer may offer a deferral-type relief upon an incomplete application as long as it “waives **all** existing late charges, penalties, stop payment fees, or similar charges promptly upon the borrower’s acceptance of the loss mitigation option.” The IFR does not distinguish the timing of the late fees, and HUD’s guidance should follow suit.

Relatedly, HUD guidance should clearly state that its COVID-19 loss mitigation options must bring borrowers completely current on their loans. Mortgagee Letter 2021-05 limits what can be included in a partial claim or capitalized balance; however, its list is not comprehensive of all charges that a servicer can assess on a loan, including attorney’s fees and corporate advances. HUD should explicitly address what to do with those fees so borrowers do not face a balance after completing a loss mitigation option. HUD should either allow other fees to be capitalized in a partial claim or modification or HUD should require fee waiver.

5) HUD should require servicers to conduct an escrow analysis prior to approval of a COVID-19 option and should provide examples to illustrate their guidance.

We appreciate that Mortgagee Letter 2021-05 specifically directs servicers to capitalize escrow advances and “an escrow shortage that falls below the target balance, calculated during an escrow analysis, that exceeds the amount of the Mortgagee’s advances already capitalized in the modified Mortgage.” By allowing servicers to address shortages in a loan modification, HUD will limit payment shock borrowers can face when loss mitigation does not include shortages. We commend HUD for making this adjustment.

To guide interpretation of the language, **HUD should provide examples to demonstrate to servicers how escrow shortage calculations will work. In addition, HUD should explicitly state, in line with its policy for FHA-HAMP modifications, that “[t]he Mortgagee must complete a retroactive escrow analysis of the Mortgage” prior to finalizing a loss mitigation option.** The requirement is implicit in HUD’s current COVID-19 guidance but HUD should make it clear and explicit to avoid ambiguity.

6) Analyze performance data from COVID-19 options and make it public.

In order to truly understand how the new system works, HUD must gather data from servicers. **HUD should assess through data whether borrowers are accessing assistance, whether all communities are well-served by the programs (especially the communities of color hit hardest by the pandemic), and whether the programs are providing meaningful and effective payment relief to borrowers.** In considering the program’s performance, HUD must also evaluate complaints from borrowers to the National Servicing Center to see if servicers are complying with the program. If there are structural issues with the program, HUD should amend it. **HUD also should share data reports with the public, free of charge, to provide greater transparency and accountability.**

7) Strengthen the NSC

In light of the COVID-19 pandemic and the increased levels of forbearance for FHA borrowers, HUD should strengthen the role of the National Servicing Center (NSC). We appreciate the NSC's work in facilitating agreements between borrowers and servicers. **However, in cases where servicers fail to provide borrowers with loss mitigation they are entitled to receive, the NSC should specifically direct servicers to address these errors and should provide written notice to borrowers regarding their communications with servicers.** Having a clear and effective escalations pathway is crucial to ensuring that FHA borrowers are able to obtain the loss mitigation for which they are eligible.

We appreciate your work on this important national issue and the opportunity to comment on it. For any questions or further discussion, please contact NCLC staff attorney Steve Sharpe, at ssharpe@nclc.org.

Sincerely,

Action Housing, Inc. (PA)
Americans for Financial Reform Education Fund
Atlanta Legal Aid Society, Inc.
Center for NYC Neighborhoods
Center for Responsible Lending
Community Legal Services of Philadelphia
Connecticut Fair Housing Center
Consumer Action
Financial Protection Law Center (NC)
Jacksonville Area Legal Aid
The Legal Aid Society of Cleveland
The Legal Aid Society of Columbus
Legal Aid Society of the District of Columbia
Legal Aid Society of Southwest Ohio, LLC
Mountain State Justice, Inc. (WV)
National Consumer Law Center (on behalf of its low-income clients)
National Fair Housing Alliance
National Housing Law Project
New Jersey Citizen Action
NHS Brooklyn, CDC, Inc.
Philadelphia Unemployment Project / Save Our Homes Coalition
Public Counsel (CA)
Southeastern Ohio Legal Services